

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer

## Second Circuit Decision Creates a Moving Target for Statute of Limitations Calculations

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Under the FDCPA, a plaintiff must bring its claims within one year from the date the violation occurs. A recent decision by the Second Circuit demonstrates that the date the violation occurs can be a moving target depending upon the nature of the violation and the actions of the debt collector. In *Benzemann v. Citibank*, the plaintiff's bank account was mistakenly frozen. The restraining notice that gave rise to the freeze was issued on December 6, 2011 but the actual freeze on the account didn't occur until December 14, 2011. The plaintiff's suit was filed on December 14, 2012 and the law firm moved to dismiss, contending that the actions giving rise to the suit – i.e., their issuance of the restraining order- occurred more than a year prior to the filing of the suit. The district court agreed and dismissed the FDCPA claims against the law firm.

On appeal, however, the Second Circuit raised concerns with the "anomaly" created when the FDCPA claim accrues for the purpose of calculating when the statute of limitations begins to run (in this case, when the restraining notice was issued), but at another time for purpose of bringing suit (when the injury occurred or in this case, when the account was frozen). The Second Circuit noted that a "cause of action accrues when the conduct that invades the rights of another has caused injury." *Benzemann v. Citibank*, 2015 U.S. App. LEXIS 19875, \* 7 (2nd Cir. Nov. 16, 2015). In concluding that the statute of limitations could not begin to run until the injury occurred, the court noted that they saw "no indication in the text of Section 1692k(d) that Congress intended for the FDCPA's statute of limitations to begin to run before an FDCPA plaintiff could file suit", finding it "implausible that the Congress that passed the FDCPA intended to create such an anomalous result." *Id.* at \*8-9. The court therefore concluded that under the facts presented, the statute of limitations did not begin to run until the account was frozen.

So what about the FDCPA case brought based upon a letter violation? When does it occur? Under the logic of the Second Circuit's decision it shouldn't accrue until the letter is received. However, at least two other circuits (the 8<sup>th</sup> and 11<sup>th</sup>) have held that in the context of FDCPA claims premised on unlawful debt collection notices, the FDCPA violation occurs when the notice was mailed versus received. "Those courts reasoned

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

that tying the statute of limitations to the date of mailing was necessary because (1) mailing is the debt collector's last opportunity to comply with the FDCPA and (2) the date of the mailing is easy to determine and ascertainable by each party, yielding a rule that is easy to apply." *Id.* at \*12. The Second Circuit explained away those rulings by distinguishing the fact that the date of mailing is easy to determine in those cases while the date of receipt is not. The Second Circuit concluded that the reasoning in those decisions was simply not applicable under the facts presented by *Benzemann*.

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